

No. 44751-7-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARK J. GOSSETT

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF THURSTON COUNTY

Cause No. 08-1-02102-9

REPLY BRIEF TO PERSONAL RESTRAINT PETITION

Wayne C. Fricke
WSB #16550

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

Table of Contents

TABLE OF AUTHORITIES.....	3
I. STATEMENT OF THE CASE	4
II. ARGUMENT	4
III. CONCLUSION	6

TABLE OF AUTHORITIES

Cases

<u>Fagan v. Washington</u> , 942 F.2d 1155, 1157 (7 th Cir. 1991)	4
<u>Matire v. Wainwright</u> , 811 F.2d 1430 (11 th Cir 1987)	4
<u>Mayo v. Henderson</u> , 13 F.3d 528, 533 (2 nd Cir. 1994).....	4, 5
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009)	5, 6
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	6
<u>State v. Walker</u> , 164 Wn.App. 724, 265 P.3d 191 (2011).....	5

I. STATEMENT OF THE CASE

The petitioner adopts the statement of the case as set forth in his opening brief.

II. ARGUMENT

The entire thrust of the State's argument appears to be that counsel's failures were legitimate tactical decisions. However, it is telling that the State presents no argument as to how or why the failures constitute legitimate tactical decisions. That is because they cannot be so classified.

First, as it relates to appellate counsel's failure to adequately present issues on appeal, Petitioner does not dispute that it is not ineffective assistance of counsel for failure to raise weak arguments. However, the same is not true for failure to raise legitimate issues where either the law is clearly settled or even where it is in flux. See Matire v. Wainwright, 811 F.2d 1430 (11th Cir 1987). Under these situations, as is the situation here, the courts have consistently held that it is ineffective for failing to raise the issue. As stated in Mayo v. Henderson, 13 F.3d 528, 533 (2nd Cir. 1994):

When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the...court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985). *See, also*, Fagan v. Washington, 942 F.2d 1155, 1157 (7th Cir. 1991) ("His lawyer failed to raise

either claim, instead raising weaker claims...No tactical reason—no reason other than oversight or incompetence—has been or can be assigned for the lawyer’s failure to raise the only substantial claims that [defendant] had.”).

The Mayo court reversed defendant’s conviction because the appellate counsel failed to raise issues that no reasonably competent attorney would have missed, instead only brings claims that “were extremely weak”. 13 F. 3d at 534. Similarly, appellate counsel here raised only weak arguments, bypassing the arguments that the courts of this state have consistently held to be reversible error. As such his performance was deficient.

Thus, the only issue is whether petitioner has established prejudice. As stated in Mayo , “[t]o establish prejudice in the appellate context, “a petitioner must demonstrate that there was a reasonable probability that [his] claim would have been successful before the [state’s] highest court.” (citation omitted)

As noted in the opening briefs, the Supreme Court, in several instances prior to the appellate briefing that was done in this case, had already conclusively established that the conduct alleged in this case is reversible error. *See State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009); *State v. Walker*, 164 Wn.App. 724, 265 P.3d 191 (2011).

Secondly, as it relates to trial counsel’s deficient performance, there can be no legitimate reason to allow for the introduction of damaging propensity evidence that goes beyond an explanation of delayed reporting—something that was never argued to the jury. All of the cases cited above, and in the opening brief, make that clear. As the State points out, these cases are “particularly

difficult.” State’s brief at 19. But to then suggest, as the State argues, that an “attorney would understandably be reluctant to appear to be interfering with the presentation of evidence”, is meritless. Pretrial rulings would take care of any appearance of interfering, if that were an issue. Moreover, as Fisher and the other cases cited in Petitioner’s opening brief make clear, it is not a sound strategy decision and the failure to object is a dereliction of one’s responsibilities. *See also, State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011).

As such, the petition should be granted.

III. CONCLUSION

Based on the files and records herein, Petitioner requests that the Petition be granted and a new trial ordered.

Respectfully submitted this 26 day of June, 2013.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner



WAYNE C. FRICKE
WSB #16550

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Thurston County Prosecuting Attorney's Office
2000 Lakeridge Drive SW., Building 2
Olympia, WA 98502

Mark J. Gossett
DOC #317246
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Signed at Tacoma, Washington, this 26th day of June, 2013.


LEE ANN MATHEWS

HESTER LAW OFFICES
June 26, 2013 - 2:26 PM

Transmittal Letter

Document Uploaded: prp2-447517-Reply.pdf

Case Name: State v. Gossett

Court of Appeals Case Number: 44751-7

Is this a Personal Restraint Petition? ☒ Yes ☐ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): ____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

☒ Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ____

Comments:

No Comments were entered.

Sender Name: Leeann Mathews - Email: leeann@hesterlawgroup.com